United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

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76-1599

To be argued by
EDWARD R. KORMAN

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 7[redacted]

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UNITED STATES OF AMERICA,

Appellant,

- against -

ZVONKO BUSIC, JULIENNE BUSIC,
PETAR MATANIC, FRANE PESUT,
and MARC VLASIC,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLANT

DAVID G. TRAGER
United States Attorney
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

EDWARD R. KORMAN
Chief Assistant United States Attorney,
(Of Counsel)

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases:

Cases: (Continued) Page

Statutes:

Other Authorities:

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 76-1552

UNITED STATES OF AMERICA,

Appellant,

-against-

ZVONKO BUSIC, JULIENNE BUSIC,
PETAR MATANIC, FRANE PESUT,
and MARC VLASIC,

Appellees.

BRIEF FOR THE APPELLANT

PRELIMINARY STATEMENT

The United States of America appeals from an order of the District Court for the Eastern District of New York, Bartels, J., which granted a pretrial motion by the defendants and dismissed Counts One and Two of the indictment on the ground of improper venue (A. 19). Counts One and Two alleged that "within the Eastern District of New York and elsewhere", the defendants "attempted to commit and did commit air piracy as defined in 49 U.S.C., Section 1472(i)(2), in that the defendants *** by threat of force of violence and with wrongful intent did attempt to and did seize and exercise control of an aircraft within the special aircraft jurisdiction of the United States,

to wit, a Boeing 727 known as Trans World Airline Flight 355 bound from LaGuardia Airport, Queens, New York and en route to O'Hare Airport, Chicago, Illinois" (A. 16-17). The only difference between the two counts is that one contains the additional allegation that the commission of the offense "resulted in the death of New York City Police Officer Brian Murray"(A. 16). 1/

STATEMENT OF THE CASE

1. The underlying facts upon which the indictment was based, and upon which the district court rested its holding that venue did not lie in the Eastern District of New York, came from an offer of proof by the United States, which was based upon a statement made by the defendant Zvonco Busic (A. 212-221) after his arrest and other information disclosed by the investigation (A. 197, 198-200). We set forth below the summary of those facts as described in the opinion of the district court (A. 23-24):

> On September 10, 1976, defendants boarded a Chicago-bound TWA flight 355 at LaGuardia airport with several cast iron pots which they described to the airline personnel as intended gifts [and putty which had been preformed to resemble sticks of explosives (A. 213)]. These pots were later assembled to look like bombs and were used to

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1/ Count Three of the indictment, which is not here in issue, charged the defendants with conspiracy to commit the offenses described above (A. 17).

effectuate the plane's seizure [A. 212-214]. On the same day prior to embarkation, an actual explodable bomb was placed in a locker at the Grand Central Station in the Southern District of New York [A. 217-218] 2/, along with a note explaining the defendants' purpose in hijacking the plane (not at that time hijacked) and listing certain demands [A. 291-292]. [The note further warned that if the demands were not met, "a second explosive device, which is likewise in a highly busy location, shall be activated."] The key to this locker was thrown away by one of the defendants before embarkation [A. 219].

After the plane doors were closed but prior to take-off one of the defendants told a passenger who attempted to use the lavatory, to return to his seat, informing him that a bag at his feet contained three bombs and that "[t]his is a hijack ..."[A. 197]. The plane took off and proceeded in a northwesterly direction, but its exact route is not yet known. At some point outside of the Eastern District of New York a note was passed to a flight attendant stating that "This airplane is hijacked" and containing certain instructions, some of which referred to the bomb in the locker [A. 291]. Two to six minutes after the flight attendant received the note, it was passed to the pilot, at some point in western New York State. Pursuant to the demands of the defendants, the aircraft continued north but it did not touch down again in the United States. After some intermediate stops, the plane came to rest in Paris, France, where the hijackers were apprehended. From there the defendants were transported to Kennedy Airport in the Eastern District of New York where they were promptly arrested by the F.B.I.

2. On October 27, 1976, the defendant Zvonco Busic filed a motion, which was ultimately joined by the other defendants,

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2/ The explosion of the bomb resulted in the death of New York City Police Officer Murray, which is alleged in Count One of the indictment.

to dismiss Counts One and Two of the indictment on the ground of improper venue (A. 149). The defendants argued that, on the basis of "discovery material furnished by the government, as well as the newspaper accounts of the events in issue", it was plain that the defendants had not seized and exercised control of the aircraft until the airplane was over the airspace in the vicinity of Buffalo, New York (A. 165) when the hijackers' note was delivered to the pilot and the latter "acknowledged by word and deed that control had been seized and was being exercised by defendants" (A. 166).

The United States responded by arguing that, although the crime of air piracy is not committed until the control of the plane was wrongfully exercised by the hijackers, the special venue statute enacted by Congress [49 U.S.C. §1473(a)], did not limit venue to only the district or districts over which the crime was "committed", but also permitted venue in the district where the offense had "begun".[3/] Unless the word "begun"

3/ Section 1473(a) provides in pertinent part:

> "The trial of any offense under this chapter shall be in the district in which such offense is committed; or, if the offense is committed out of the jurisdiction of any particular State or district, the trial shall be in the district where the offender, or any one of two or more joint offenders, is arrested or is first brought. ... Whenever the offense is begun in one jurisdiction and completed in another, or committed in more than one jurisdiction, it may be dealt with, inquired of, tried, determined, and punished in any jurisdiction in which such offense was begun, continued, or completed, in the same manner as if the offense had been actually and wholly committed therein."

was to be rendered meaningless, it must necessarily encompass a district in which the acts of the defendant fell short of the actual commission of the offense. Considerations of policy, it was argued, justified a liberal construction of the word begun which would permit venue to rest in the district where hijackers had boarded the hijacked aircraft after making all of the essential preparations that could be made, prior to take-off, in furtherance of the preconceived plan to seize the aircraft (A. 54-57).

Moreover, alternatively, the United States argued that since the offense here, the wrongful exercise of control over the aircraft, was also committed outside of the United States, and hence "out of the jurisdiction of any particular State or district", venue was proper under Section 1473(a) because the defendants were ultimately arrested in the Eastern District of New York (A. 63-65).

3. The district court judge agreed that every consideration of policy justified a holding that venue was proper in the Eastern District of New York. Indeed, Judge Bartels previously had been unsuccessful in eliciting from the defendants a single reason - other than the technical legal basis for the motion - why the case should be tried hundreds of miles from New York City in a district to which the defendants and the offense had nothing but a fortuitous connection (A. 65-67). Thus Judge Bartels observed (A. 32-33):

> "The government insists that there are strong policy considerations in favor of finding venue proper in the Eastern District of New York, citing United States v. Johnson, 323 U.S. 272 (1944) ***. We agree with the Government; unfortunately, Congress did not so provide.
>
> The Court is aware that none of the defendants and none of the witnesses will have anything more than a fortuitous connection with any district over which the plane flew other than the Eastern District of New York and its surrounding metropolitan area. It would seem that the most logical place for air piracy cases to be tried would be in the district where defendants boarded the aircraft. However, defendants for some reason are dissatisifed with this forum and Congress has not otherwise authorized trial here. Instead, the legislative history shows Congress' intent that venue of offenses committed five miles in the air be tied to the jurisdiction and county or district over which the plane was flying. H.R. Rep. No. 958, 87th Cong., 1st Sess., 1961 U.S. Code Cong. & Admin. News, 2563; 107 Cong. Rec. 15431, 16548 (1961). Accordingly, we are left with no alternative but dismissal."

Later on, in colloquy with defense counsel, Judge Bartels again stated (A. 118):

> "You want my opinion about this whole business? It makes no sense to try this case in Erie County. Down here you have all the witnesses, the defendants and their friends *** and the purpose of this removal to Buffalo completely escapes me. Do you understand why I wonder?"

We believe that Judge Bartels erroneously construed the language and legislative history of Section 1473(a) and that one of the principal errors was his conclusion that the policy considerations which he alluded to had no place in the construction of Section 1473. Indeed, the only reason we are appealing from the order of dismissal, which we believe is

otherwise erroneous, is because we agree with Judge Bartels that it makes no sense to try this case hundreds of miles from New York City in a district having no relation to defendants or the offense. The defendants' desire to have the trial there is simply another example of gamesmanship in the criminal process. Their motion was either designed to delay the trial, to "judge shop", or at best, to create an issue to reverse a judgment of conviction if the motion was denied.

ARGUMENT

VENUE WAS PROPER IN THE EASTERN DISTRICT OF NEW YORK

A. The Offense of Air Piracy Began When the Defendants Attempted To Commit It in the Eastern District of New York.

1. The initial question which must be resolved here is whether the hijacking began in the Eastern District of New York. The answer to this question, however, like many issues of statutory and constitutional construction, depends on why the question is being asked. This is so because, as Judge Learned Hand observed, "it is one of the surest indexes of a matured and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning."

Cabell v. Markham, 148 F.2d 737, 739 (C.A. 2, 1945), affirmed, 326 U.S. 404 (1945). Accord: Rosenberg v. Richardson, ___F.2d ___, No.75-6138 (C.A. 2, June 16, 1976).

The reason the question whether the offense began in the Eastern District of New York is asked here, is to determine whether venue is appropriate under the special venue statute which Congress enacted for the offense of air piracy. This particular issue of statutory construction, indeed, has always turned not on whether "violence is done to the normal use of language" by holding that an offense has "begun" in a particular place (United States v. Bozza, 365 F.2d 206, 221 (C.A. 2, 1966), but upon whether violence is done to policies underlying the basic principle that a defendant is entitled to a trial in the district in which the offense was committed. As the Supreme Court observed in United States v. Cores, 356 U.S. 405, 407 (1958):

> "*** The provision for trial in the vicinity of the crime is a safeguard against the unfairness and hardship involved when an accused is prosecuted in a remote place. Provided its language permits, the act in question should be given that construction which will respect such considerations."

Moreover, in cases having an interstate nexus, it is particularly desirable to give a fairly expansive construction to the word "begun" to permit venue to lie in the district where most of the acts performed in furtherance of this scheme took place even though the other acts necessary to its ultimate

consummation took place elsewhere. As Judge Lumbard observed in United States v. Cashin, 281 F.2d 669, 673 (C.A. 2, 1960):

> "[A]n expansive interpretation of the venue provisions of § 3237(a) as applied to Securities Act cases, together with application of the liberal transfer provisions of Rule 21(b) of the Federal Rules of Criminal Procedure, permits the selection of the place of trial in each case as justice and convenience dictate."

These considerations of statutory construction and sound public policy underlie the basic position that we argue for here, i.e., that the offense of air piracy had begun when the acts of preparation proceeded so far toward the commission of the offense that, if they had been stopped at that point, the defendants would nevertheless be deemed to have been guilty of the attempt to commit the offense.

This construction is in accord with one of the principal purposes of Section 1473(a) which is to eliminate to the extent possible the problem of establishing precisely where the offense is committed when "the offense is committed on a jet aircarft travelling at 600 miles per hour at an altitude of 30,000 feet" H.R. Rep. No. 958,87th Cong., 1st Sess., 1961 U.S. Code Cong. & Adm. News, 2563, 2564. Indeed, the legislative history indicates that Congress sought to permit venue in any district having a nexus with the offense sufficient to satisfy constitutional directives regarding the selection of a place for trial. H.R. Rep. No. 958, supra, 1961 U.S Code Cong. & Adm. News at 2578.

The construction which we argue for, of course, is consistent with the basic principles underlying the constitutional directive that an accused should not be forced to trial in a remote place with which he and the offense have no connection. One who hijacks a plane in midair will invariably have far greater connection with the district where he boarded the plane and made essential preparations for the consummation of the offense than he will have with some district over which the plane is cruising at altitudes as high as 30,000 feet and at speeds of 500 miles per hour. Indeed, had this indictment been returned in Buffalo, New York, the defendants would no doubt be playing their game by complaining that the convenience of the parties and the interest of justice made a change of venue to New York City essential.

Finally as in United States v. Cashin, supra, the interpretation of Section 1473(a) which is urged here, together with the transfer provisions of F. R. Crim. P., Rule 21(b), will permit the selection of the place of trial "in each case as justice and convenience dictate." Of course, as Judge Bartels rightly observed, here that place is the Eastern District of New York.

2. The foregoing discussion had dealt mainly with the considerations of policy which must be considered in cases of this kind; indeed, one of the principal errors made by the district court was the assumption that these considerations were totally irrelevant. See, e.g., United States v. Bozza, supra, 365 F.2d 221-222. We shall now proceed to show that the construction

of the word "begun" which we urge is not at all novel or extraordinary.

We start by observing that, unlike cases in which it is necessary to determine whether a particular offense was intended by Congress to come within the ambit of the continuing offense provision of the general venue statute [18 U.S.C. §3237(a)], here Congress has specifically said that the crime of air piracy is such an offense, which may be prosecuted either in the district in which it is "committed", or in the district where it had "begun". Since the word "begun" would be rendered meaningless if it was construed to encompass only conduct constituting the commission of the offense, it has not been so literally construed. On the contrary, it has been held applicable to conduct which would not be held, without some further act, to constitute the commission of the offense. So, for example, it is settled law that venue for the offense of attempted evasion of income taxes will lie where the return is prepared, even though it is obvious that, if the taxpayer had a change of heart before filing the return, no crime would have been committed. See, e.g., United States v. Gross, 276 F.2d 816, 818 (C.A. 2, 1960), certiorari denied, 363 U.S. 831 (1960); United States v. Slutsky, 487 F.2d 832 (C.A. 2, 1973). Similarly in United States v. Cashin, supra, it was held that venue for the offense of employing a fraudulent scheme in the sale of securities by use of the mails was proper in the district where

all of the acts performed in furtherance of the scheme took place, even though no crime was committed until the mails were used in another district. Moreover, in United States v. Leonard, 500 F.2d 673 (C.A. 5, 1974), it was held that the crime of rape began on a United States Air Force Base from which the victim was forcibly abducted rather than in a motel off base where the rape actually took place.

The reason that it is immaterial in each of those cases that the defendants still had the opportunity to change their minds before the crime with which they were charged was actually committed, a factor which the defendants argued below was critical, [4/] is that the issue is not whether the defendant should be punished for an inchoate crime, but where venue should lie. Since the offense was completed, there is simply no reason to be concerned about whether there was still time for the defendants to change their minds.

Judge Bartels, however, essentially accepted the defendants' argument that the crime has not begun as long as there was an opportunity for the defendants to change their minds. Thus he stated (A. 26-27):

4/ The defendants relied upon dictum in Travis v. United States, 364 U.S. 631 (1964) to support this argument. The holding in Travis, however, as the opinion makes plain (364 U.S. at 635), is limited to the peculiar statute there at issue, and has been so limited by this Court. United States v. Slutsky, 487 F.2d 832, 839, n. 8 (C.A. 2, 1973), certiorari denied, 416 U.S. 937 (1973).

> "the term 'begun' in §1473(a) does not refer to mere preparation, but refers to the stage where the preparations have progressed to the first steps toward the commission of the crime, such as the first contact with the aircraft personnel notifying them of the intention to hijack. In this instance, such contact was not made until the note was handed to the flight attendant outside of the Eastern District of New York."

We believe that, for reasons of law and policy set forth above, the "first steps" toward the commission of the offense should be deemed to have been taken when the defendants set foot on the aircraft, after carefully planning its unlawful seizure, with the means at hand to consummate the offense. Surely, had they been apprehended at that point, as a result of an anonymous tip, they would have been guilty of an attempt to commit the offense. Indeed, the airpiracy statute was amended in 1974, to provide that offenses occuring prior to takeoff should be declared to be within the territorial jurisdiction of the United States, to cover just such a situation. One of the cases which Congress intended to overrule was United States v. Pliskow, 354 F.2d 369 (E.D. Mich.), affirmed, 480 F.2d 927 (6th Cir. 1973), which is described in the H.R. Rep. 93-885 as follows:

> "In Pliskow the defendant boarded an aircraft with two sticks of dynamite and a .25 caliber automatic pistol and notes which clearly indicated an intent to hijack the aircraft. A possible tragedy was only averted as a result of a tip from an informant that there would be a hijacking. The defendant was arrested after a struggle. Despite the defendant's obvious intent to hijack

> the aircraft and the danger posed to both the aircraft and its passengers, the defendant could not be successfully prosecuted for a violation of existing law because the aircraft neither left the terminal gate nor had the engines been started."

H. R. Rep. 93-885, 93rd Cong., 1st Sess., 1974, U.S. Code Cong. & Administrative News, 3979.

The conduct of the defendants here is simply indistinguishable from the defendant in United States v. Pliskow, supra. Indeed, we find it difficult to follow the district court's conclusory statement that the defendants' conduct "did not leave the zone of preparation and did not come near enough to the completion of the offense so that they were not sufficiently substantial to constitute a criminal attempt" (A. 30). Not even the defendants were prepared to make that argument in the district court (A. 163-164), and we do not understand how Judge Bartels could have concluded that, had the defendants been apprehended in the same manner as Pliskow, they would not be guilty of attempting to hijack the plane. Indeed, under Judge Bartel's reasoning, if there had been only one individual acting alone, thus making the conspiracy statute inapplicable, he could not have been arrested until he passed the note to the pilot after the plane was in the air, because until then he would not have violated the antipiracy statute. This result is absurd and it is nothing short of startling to say such conduct constitutes mere "preparation".

In short, the crime of airpiracy began with the attempt to commit the offense and it is immaterial that the defendants could have changed their minds at this point. 5/ Since the defendants went forward to hijack the plane, the only relevant question is whether the steps they did take in the Eastern District of New York make it fair, reasonable, and hence, constitutional, to prosecute them in this district for the completed offense. Quite plainly they do.

b. The Offense of Airpiracy Was Committed Outside the Jurisdiction of the United States and Venue Is Proper in the Eastern District of New York Where the Defendants Were Arrested.

Section 1473(a) provides an alternative basis for venue here; for it also provides that "if the offense is committed outside the jurisdiction of any particular state or district, the trial shall be in the district where the offender *** is arrested or is first brought ***." Here it is not disputed that the offense of airpiracy, although

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5/ We should make clear that we are not arguing here, as we did in the district court, that even if venue is not proper on the consummated offense, Counts One and Two may nevertheless be tried here because they also allege an "attempt". There is enough potential for confusion in this case without adding to it a trial limited to an attempt in a case in which the offense was completed. Accordingly, if the Court finds that venue does not lie for the completed offense, then the judgment should be affirmed. We are arguing that venue for the substantive offense may lie in the district where the attempt was commited, i.e., that the offense was begun in the district where it was attempted. If the Court agrees with this position, then it does become necessary to consider whether the defendants' act constituted an attempt in the Eastern District of New York.

it began in the United States, was continued and was committed in large part outside the jurisdiction of the United States, in Canada, over the Atlantic Ocean and in France. Of course, it is also undisputed that the defendants were arrested and first brought to the Eastern District of New York.

Nevertheless, again giveing Section 1473(a) its most literal construction, the district court held that in order to invoke this venue clause, the offense had to be committed "wholly" outside the jurisdiction of the United States (A. 30-31). Where, as here, the offense began several miles over some part of the United States and continued overseas, the offense had be be tried in the district over which the plane happened to be flying when it was seized.

Here again, we believe the district court erred. The Supreme Court long ago observed that a crime "committed against the laws of the United States, outside of the limits of a state, is now local, but may be tried as Congress shall designate by law." United States v. Dawson, 15 How. (56 U.S.), 467, 488 (1853). Quite plainly the offense here, though commenced in the United States, was not local, and Congress could, consistent with the Venue Clause of the Sixth Amendment, provide for trial in the district where the defendants were first brought or arrested. Indeed, if there were any doubt about this proposition in a normal offense, it should dissipate with respect to airborne offenses such as this. While it might be suggested

that, if an offense is committed in part within the United States, the state and district where that occurs will have a greater nexus with the defendant than the district where defendant is arrested or first brought, here it is clearly not the case. Indeed, with respect to airborne offenses such as this, the state and district over which the plane is flying when seized, has no meaningful nexus with the offender and the offense.

Moreover, as we have shown, Congress was concerned with eliminating the difficulties of establishing venue tied to the area over which the offense was committed. Ye the district court's construction of Section 1473(a) will perpetuate those problems. While in the instant case it is clear that at least part of the offense was committed over an identifiable district in the United States, one can imagine a case in which an airliner is seized somewhere in the vicinity of its departure from the territory of the United States, i.e., the border between the United States and Canada, where it may be impossible to establish the precise point where the seizure occurred. The result can hardly be that the defendant cannot be tried in any district.[6/]

6/ The burden of establishing venue, albeit by a preponderance of evidence, is on the United States. United States v. Panebianco, __F.2d__, No. 76-1132 (C.A. 2, October 14, 1976), Slip op. p. 137.

Moreover, the scheme of Section 1473(a) lends further support to our argument. Thus Section 1473(a) permits venue in any district in which the crime may be committed. Since here the crime was committed outside the jurisdiction of the United States, it is logical to look to the district which Congress has designated for the trial of such offenses, i.e., the jurisdiction where the offender is arrested or first brought.

CONCLUSION

The judgment of the district court should be reversed.

December 22, 1976.

Respectfully submitted,

DAVID G. TRAGER
United States Attorney
Eastern District of New York

EDWARD R. KORMAN
Chief Assistant United States Attorney,
(Of Counsel).